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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

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SUPREME COURT, U.S.

DAVID JOSEPH STEFFEN, :

Petitioner : No. 87-5323

vs. :

THE STATE OF OHIO :

Respondent :

Supreme Court, U.S.
FILED
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ORIGINAL

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

I. CALDWELL V. MISSISSIPPI (1985), 472 U.S. 320, IS NOT APPLICABLE WHERE THE JURY CHARGE GIVEN DURING THE MITIGATION POHASE OF A CAPITAL PROSECUTION IS AN ACCURATE STATEMENT OF LAW, DID NOT ENCOURAGE THE JURY TO RELY ON THE APPELLATE PROCESS, WAS NOT OBJECTED TO AT TRIAL, AND WAS ARGUED TO THE JURY BY DEFENSE COUNSEL.

II. THE USE OF THE SAME UNDERLYING FELONY TO ELEVATE A HOMICIDE TO AGGRAVATED MURDER AND THEN TO ELEVATE THE AGGRAVATED MURDER TO A CAPITAL OFFENSE DOES NOT CAUSE THE OHIO DEATH PENALTY SCHEME TO BECOME UNCONSTITUTIONAL.

III. WHERE AN ISSUE PRESENTED TO THIS COURT FOR REVIEW IS PREMISED UPON A MISSTATEMENT OF THE APPLICABLE STATE LAW, AND WHERE THE STATE LAW AS IT EXISTS WAS PROPERLY APPLIED TO THE CASE, PETITIONER HAS NO BASIS TO SEEK CERTIORARI.

IV. THERE IS NO BASIS FOR REVIEWING A CLAIM THAT A DEATH PENALTY WAS BASED UPON NON-STATUTORY AGGRAVATING CIRCUMSTANCES, AND UPON A REFUSAL TO CONSIDER MITIGATING FACTORS, WHEN THE RECORD PLAINLY DEMONSTRATES THAT THESE CLAIMS ARE INCORRECT.

V. PROPORTIONALITY REVIEW IS NOT REQUIRED IN STATE DEATH PENALTY STATUTES, AND IF A STATE DOES PROVIDE FOR A PROPORTIONALITY REVIEW, IT IS UP TO THE STATE TO DETERMINE THE SCOPE OF SUCH REVIEW.

VI. WHERE THE STATE COURTS HAVE FOUND THAT THE ADMISSION OF A STATEMENT BY THE DECEASED PURSUANT TO AN EXCEPTION TO THE HEARSAY RULE IS HARMLESS ERROR, AND THE STATEMENT AT ISSUE IS EXTREMELY INSIGNIFICANT, THIS COURT WILL NOT GRANT CERTIORARI WHERE THE RECORD FULLY SUPPORTS THE CONCLUSION OF THE STATE COURTS.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i.
TABLE OF CONTENTS	ii.
TABLE OF AUTHORITIES	iv.
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF FACTS	2
REASONS FOR GRANTING THE WRIT	
I. CALDWELL V. MISSISSIPPI (1985), 472 U.S. 320, IS NOT APPLICABLE WHERE THE JURY CHARGE GIVEN DURING THE MITIGATION POHASE OF A CAPITAL PROSECUTION IS AN ACCURATE STATEMENT OF LAW, DID NOT ENCOURAGE THE JURY TO RELY ON THE APPELLATE PROCESS, WAS NOT OBJECTED TO AT TRIAL, AND WAS ARGUED TO THE JURY BY DEFENSE COUNSEL.	
ISSUES PRESENTED FOR REVIEW AND ARGUMENT	
1. AN APPELLATE COURT NEED NOT CONSIDER AN ERROR WHICH A PARTY COMPLAINS THAT THE TRIAL COURT'S JUDGMENT COULD HAVE CALLED, BUT DID NOT CALL, TO THE TRIAL COURT'S ATTENTION AT A TIME WHEN SUCH ERROR COULD HAVE BEEN AVOIDED OR CORRECTED BY THE TRIAL COURT.	
2. A JURY INSTRUCTION DURING THE PENALTY PHASE OF A CAPITAL CASE INFORMING THE JURY THAT THEIR DEATH PENALTY VERDICT IS ONLY A RECOMMENDATION, WHILE A LIFE SENTENCE VERDICT IS BINDING, DOES NOT OFFEND THE UNITED STATES CONSTITUTION.	
3. A DEFENDANT MAY NOT OBJECT TO A JURY INSTRUCTION WHERE HE HAS ARGUED THE IDENTICAL CONCEPT OF LAW TO THE JURY IN HIS ARGUMENT TO THE SENTENCING JURY.	10
II. THE USE OF THE SAME UNDERLYING FELONY TO ELEVATE A HOMICIDE TO AGGRAVATED MURDER AND THEN TO ELEVATE THE AGGRAVATED MURDER TO A CAPITAL OFFENSE DOES NOT CAUSE THE OHIO DEATH PENALTY SCHEME TO BECOME UNCONSTITUTIONAL.	16
III. WHERE AN ISSUE PRESENTED TO THIS COURT FOR REVIEW IS PREMISED UPON A MISSTATEMENT OF THE APPLICABLE STATE LAW, AND WHERE THE STATE LAW AS IT EXISTS WAS PROPERLY APPLIED TO THE CASE, PETITIONER HAS NO BASIS TO SEEK CERTIORARI.	22
IV. THERE IS NO BASIS FOR REVIEWING A CLAIM THAT A DEATH PENALTY WAS BASED UPON NON-STATUTORY AGGRAVATING CIRCUMSTANCES, AND UPON A REFUSAL TO CONSIDER MITIGATING FACTORS, WHEN THE RECORD PLAINLY DEMONSTRATES THAT THESE CLAIMS ARE INCORRECT.	24
V. PROPORTIONALITY REVIEW IS NOT REQUIRED IN STATE DEATH PENALTY STATUTES, AND IF A STATE DOES PROVIDE FOR A PROPORTIONALITY REVIEW, IT IS UP TO THE STATE TO DETERMINE THE SCOPE OF SUCH REVIEW.	35
VI. WHERE THE STATE COURTS HAVE FOUND THAT THE ADMISSION OF A STATEMENT BY THE DECEASED PURSUANT TO AN EXCEPTION TO THE HEARSAY RULE IS HARMLESS ERROR, AND THE STATEMENT AT ISSUE IS EXTREMELY INSIGNIFICANT, THIS COURT WILL NOT GRANT CERTIORARI WHERE THE RECORD FULLY SUPPORTS THE CONCLUSION OF THE STATE COURTS.	36

TABLE OF CONTENTS (Cont'd)

Page

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

A STATEMENT OF THEN EXISTING MENTAL, EMOTIONAL OR PHYSICAL CONDITION IS AN EXCEPTION TO THE HEARSAY RULE UNDER EVID. R. 803(3). 36

CONCLUSION 38

APPENDIX "A" - Constitutional and Statutory provisions involved 39

TABLE OF AUTHORITIES

	Page
CASES CITED:	
Albernay v. United States, 450 U.S. 333, 101 S.Ct. 1137 (1981)	19
Barclay v. Florida, 463 U.S. 939, 103 S.Ct 3418 (1984)	16
Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985)	10,12,13 14
California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446 (1983)	13
Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558 (1982)	12
Garrett v. United States, 471 U.S. _____, 105 S.Ct. 2407 (1985)	19
Gray v. Lucas, 677 F.2d 1086 (5th Circ., 1982)	17
Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976)	24
Lowenfield v. Phelps, 817 F.2d 285 (5th Circ. 1987)	17
Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673 (1983)	20
Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976)	22
Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984)	34
State v. Awan, 22 O.S.3d 120 (1986)	11,25
State v. Bickerstaff, 10 O.S.3d 62, 461 N.E.2d 892 (1984)	19
State v. Buell, 22 O.S.3d 124, 489 N.E.2d 795 (1986)	10,12
State v. Combs, 18 O.S.2d 123 (1985)	25,26
State v. DeHass, 10 O.S.2d 230 (1967)	23
State v. Eubanks, 60 O.S.2d 183, 14 O.O.3d 416 (1979)	25
State v. Jenkins, 15 O.S.3d 164, at 202, 473 N.E.2d 264 (1984)	10,18,29
State v. Moss, 69 O.S.2d 515, 433 N.E.2d 181 (1983)	19
State v. Phillips, 27 O.S.2d 294 (1971)	24,25
State v. Rogers, 28 O.S.2d 427, 504 N.E.2d 52 (1987)	10,12,18
State v. Thomas, 70 O.S.2d 79 (1986)	23
State v. Williams, 51 O.S.2d 112, 364 N.E.2d 1364 (1977)	11,24,25
Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432 (1980)	19
Wingo v. Blackburn, 783 F.2d 1046 (5th Circ. 1986)	17
Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983)	16
RULES CITED:	
Evid. R. 803, Hearsay Exceptions: Availability of Declarant Immaterial	36
STATUTES CITED:	

	Page
R.C. 2903.01	16
R.C. 2903.01(B)	17
R.C. 2903.01(D)	20
R.C. 2929.03(A)	28
R.C. 2929.03(F)	23
R.C. 2929.04(A)	16
R.C. 2929.04(A)(7)	16,17,36
R.C. 2929.04(B)	23,28,31
R.C. 2929.04(B)(4)	23
R.C. 2929.05(A)	34
R.C. 2929.05, Appellate review of death penalty	21,28

MISCELLANEOUS CITES:

28 U.S.C. §1257(3)	27

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THE STATE OF OHIO	:	
Respondent	:	

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO, BRIEF
OF RESPONDENT IN OPPOSITION
TO PETITION

OPINIONS BELOW

The decision of the Supreme Court of Ohio affirming petitioner's conviction and death sentence was released on June 24, 1987, and is reported at 31 O.S.3d 111, 509 N.E.2d 383. [The opinion in the State Appellate Court and the State Trial Court are attached to the brief of Petitioner, and those copies are accurate.]

JURISDICTION

Petitioner's jurisdictional claim is properly stated in his brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See attached Appendix "A".

STATEMENT OF THE CASE

a) Procedural Posture:

Defendant-appellant, David Joseph Steffen, was arrested on August 21, 1982, in connection with a homicide which occurred on August 19, 1982. On September 2, 1982, the Hamilton County Grand Jury returned indictment number B-820404. This instrument charged the defendant with one count of Aggravated Murder, one count of Rape, and one count of Aggravated Burglary. The indictment also contained two death penalty specifications to the first count. Those specifications were that the aggravated murder was committed while the defendant was committing or attempting to commit a rape, and that the offense occurred while the defendant was committing aggravated burglary. Defendant Steffen was arraigned on September 7, 1982, and entered a plea of not guilty. On September 10, 1982, a plea of not guilty by reason of insanity was entered. Defendant was tried to a jury in the Courtroom of Judge Robert Kraft. Trial began on April 25, 1983, and concluded on May 17, 1983. The jury returned verdicts of guilty as charged on all three counts and on both of the specifications to the first count. The sentencing phase of the trial was held on May 20, 1983. At the conclusion of deliberations, the jury recommended that a sentence of death be imposed. On May 25, 1983, the trial court sentenced the defendant to death on the aggravated murder count. Sentences of seven to 25 years were imposed on the Rape and Aggravated Burglary counts. These sentences were made to run consecutively to each other, and to the first count. On December 11, 1985, the First District Court of Appeals affirmed appellant's conviction and sentence. The Ohio Supreme Court affirmed the conviction and sentence on June 24, 1987.

b) Facts:

Defendant-appellant David Steffen was convicted of aggravated murder with two death specifications, Rape and Aggravated Burglary. The victim of the offense was a young girl, Karen Range, age 19. The crime itself was committed in a particularly savage manner, for which the defendant later showed absolutely no remorse. The defendant was a 23 year old drifter, a career

criminal with a continuous and extensive history of contact with law enforcement throughout his entire life. At the time of this offense, the defendant was wanted as a parole violator by the State of Indiana, where he had been serving time for bank robbery and escape. Steffen's family was widely scattered, and he had no relatives in the Cincinnati area. At the time this offense occurred, August 19, 1982, the defendant had been staying with a brother in the Dayton, Ohio area, where the brother was stationed at Wright-Patterson Air Force Base. On August 11, 1982, the defendant had been hired as a door-to-door salesman with a group traveling about the mid-west selling a cleaning product, Hy-Pro Cleaner. On August 19, 1982, the group was in the Cincinnati area, based at the Howard-Johnson motel in Sharonville. The practice of the group was to drop the salesman off in a particular neighborhood, and allow them to go door to door selling. They would be picked up later in the day at a designated time and place. On August 19, 1982, defendant Steffen was dropped off in the Roselawn area of Cincinnati, at about 1:30 p.m., to be picked up at about 3:00 p.m.

At 3:00 p.m., Steffen was on Parkdale Avenue attempting to sell his cleaning product. At 3:00 p.m., he failed in a sale at the Kastner residence at 7342 Parkdale. At 3:15 p.m., he tried to make a sale at 7322 Parkdale, the home of Doris Tolbert, a policewoman with the Cincinnati Police. Ms. Tolbert was on her way to work and could not take time to talk to Steffen. She characterized his approach as aggressive, using the word "pushy" to describe the defendant's technique. Shortly after this, the defendant went to the Range home at 7214 Parkdale. The reason he went there, according to his later statement, was that he saw a young girl in the yard.

That girl was 19 year old Karen Range, the only daughter of Roy and Laura Range. [Both had other children by previous marriages, but Karen was the only child of their marriage.] Karen was living with her parents, but was engaged, and was soon to be married to James Shrider, her fiance. In fact, on the 18th, they had discussed picking up their wedding rings, and Karen's plans for the 19th included dropping a check off at the travel agent's office to pay for their honeymoon cruise. Karen

was alive and well at 3:30 p.m. At that time, her mother called home and spoke to her.

Sometime around 3:30 defendant Steffen gained entrance to the Range household. In his later statement, the defendant claimed that the victim invited him in to demonstrate his cleaning product, however, there is no verification to this story by independent evidence. To the contrary, Mrs. Range testified that there had been no cleaning demonstration done that she could observe. (T.p. 1265) However there is plenty of evidence to demonstrate just what happened after this predator got past the door. Somehow the defendant got Karen into a bathroom where he beat her about the head, choked her, ripped her clothing off, and raped her. The defendant then got a paring knife from the kitchen, returned to the bathroom, and slit Karen's neck open, practically severing her head. (T.p. 1682) The injury was inflicted by at least four separate slashing wounds. This vicious attack caused Karen to die from exsanguination. (T.p. 1685) Karen's death was not an easy one. The medical testimony was that she lived for at least a brief period after one of the first gashes caused a near transection of her trachea. (T.p. 1684) Not content with what he had done, the defendant literally stomped on the dying girl's chest, leaving three footprints on her body, in the pattern on the bottom of his gym shoes. (T.p. 1674) Having completed his bloody task, the defendant then fled the area. Besides his footprints on her chest, he left other calling cards. A bloody fingerprint was left on the sink, and a Hy-Pro cleaner brochure was left behind. He also left behind a towel that he used in his demonstrations. On his way out of the house, the defendant stepped in some dog excrement, leaving another shoeprint. Once out of the house, the defendant abandoned his sales items in some bushes, and threw away his blood-covered shirt. The cleaning materials were recovered later by the police. (T.p. 1347)

The defendant realized that he had missed his pick-up time from his employers, and that he needed an excuse. To this end, at 4:17 p.m. he called the Cincinnati Police and reported his location, and told them that he had been beaten and robbed. Police Officer Robert Lemkuhl responded to the area and inter-

viewed Steffer. He found the defendant be shirtless, with scratches on his chest and neck. (T.p. 1331) Defendant Steffen described a fictional robbery to Lemkuhl, stating that two men in a blue van had attacked him and stolen his shirt, $50.00, and his cleaning material. Police put out a broadcast, and even stopped a blue van in Reading, releasing it after taking the defendant to view it. Steffen was taken to District Four and a robbery report was filled out, although Officer Lemkuhl was skeptical of the validity of the robbery claim. Steffen's employers were called, and they came to District Four and picked him up, returning to Howard Johnson's. (T.p. 1189)

That evening, the Hy-Pro people spoke to Steffen about the days events and about an unrelated problem concerning attempts to cash a check. The upshot of this was that Steffen was fired. He was taken to a bus station and put on a bus to Dayton.

Meanwhile, as all of this was going on, the defendant's brutal handiwork was being discovered. At about 6:15 p.m. Mrs. Range arrived home. Entering through the rear of the house, in the kitchen and family room, she noticed things in disarray. A television and tray table it normally rested on were both on the floor. (T.p. 1264) A cat that should have been there was missing, a table was on the floor (T.p. 1265), and there was dog excrement on the rug. She then went towards the bathroom where she saw blood on the floor and then saw her daughter's body on the floor. (T.p. 1267) The victim's shorts and panties had been ripped and shoved above her waist. Her top was torn open and her bra was ripped off her breasts, which were exposed. Mrs. Range, because of the ripped and moved clothing, thought that her daughter had been raped. Mrs. Range also noticed that her daughter's hair was wet, indicating it had not yet dried and curled after showering (T.p. 1268), which was Karen's normal procedure. Mrs. Range called the police and reported what had occurred. At about this time, her husband arrived home and saw his daughter's massacred body. The police arrived on the scene before 6:30, the homicide squad was called, and an investigation was begun.

The immediate search of the crime scene led to the recovery of the murder weapon, the brochure the defendant left

behind, as well as a fingerprint found on the bathroom sink. Buttons and snaps from the victim's ripped clothing were found all over the bathroom, including a bra snap in the sink, although the victim was on the floor. Her curling iron was still plugged in, in the other bathroom. (T.p. 1386) A toothbrush and rag used by the defendant in his demonstrations were also found in the sink and on the floor, respectively. (T.p. 1456)

The next morning, Officer Lemkuhl, who had heard of the killing, contacted homicide and told them of his contact with defendant Steffen and his belief that the crime report was false. As a result, the police contacted the Hy-Pro people and traced Steffen back to his brother's house in Dayton. At 6:00 p.m., on August 20, 1982, Officers Burke and Gardner, accompanied by a military policeman, arrived at the Wright-Patterson Air Force Base housing occupied by Paul Steffen, the defendant's brother, and the place where the defendant was staying. (T.p. 1480) The officers told Steffen that they were there in reference to his robbery report the previous day. Steffen went with them to the military police office where he was advised of his rights, signed a waiver, and was then questioned.

The initial questioning concerned the robbery report, but the focus soon shifted to the Karen Range homicide. Initially, the defendant admitted being in the area, but denied killing Karen. (T.p. 1483) Later, Steffen told police that he had a step-brother with the same name as he, and that this step-brother had been with him on the demonstrations, and had in fact committed the crime. (T.p. 14868-7) The officers verified that this statement was false by checking with his brother's family. When confronted with his falsehood, the defendant eventually admitted that he, and he alone, had killed Karen Range. (T.p. 1488) The defendant explained his version of how the murder occurred. The defendant indicated that he was in the house doing cleaning demonstrations when he accidentially bumped the victim's breast with his face. He stated that this had provoked uncontrollable screaming by the victim and that he had killed her to silence her. He stated that he could not remember whether or not he had sex with the victim. (T.p. 1492)

The defendant was held in the Greene County Jail until Monday, August 23, 1982, at which time he was returned to Cincinnati. Steffen was taken to a police facility and again advised of his rights, which he waived. He then gave a taped statement, admitting that he killed Karen Range. However, in his taped statement, he denied raping Ms. Range. (T.p. 153, ex #4) stating that:

"I tried to rape her, but I couldn't get an erection."

The defendant was indicted on a charge of aggravated murder with two (2) death penalty specifications. He was also charged with one count of rape and one count of aggravated burglary.

At trial, the State produced evidence as outlined above. Fingerprint expert Clarence Caesar identified the bloody print left in the bathroom as that of defendant Steffen. (T.p. 1445) Hair samples found on the murder weapon and on the victim's blouse were identified as being consistent with the defendant's hair. (T.p. 1566, 1569) The victim's blood type was found in stains on the defendant's jeans and shoelace. (T.p. 1686, et seq.) The analysis of the semen stains in the victim's panties, and of the semen found in her vagina could not exclude the defendant as a source. (T.p. 1623, 1629)

Deputy coroner Carl Parrott, who performed the autopsy, testified as to the injuries inflicted upon Karen Range. Dr. Parrott testified that there were dried blood spots on much of the body including:

> ". . . a single circular discoid unsmeared drop of blood on the pubis. The mons veneris just above the pubis." (T.p. 1674)

This was of great significance. Since the blood was unsmeared, it indicated it got there after intercourse had occurred, otherwise the drop would have been smeared. The coroner also testified that one full and two partial shoeprints could be seen on the victim's chest. (T.p. 1674) Not content to merely rape and kill, the defendant had gratuitously stomped on his victim's body. Semen was found on the victim's panties, as well as in her vagina and externally on her pubic hair. Because of this, Dr. Parrott concluded that intercourse occurred before death. (T.p. 1707)

Dr. Parrot further testified that there was extensive bruising to the face and head, with at least twelve (12) different blows to the head. The victim's nose was broken, and her lips were bruised and torn. The neck, eyes and lungs showed indication that the victim had been choked. There was bleeding around the brain, evidence of subdural and subarachnoid hemmorhage. (T.p. 1677) The coroner also noted bruising on the shoulders, chest and abdomen, and a bruise on the inside of the victim's right thigh. (T.p. 1682) The victim also had numerous defensive wounds on her hands and arms. All of these injuries occurred prior to the final knife attack which killed Karen Range. The defendant apparently beat her into submission, raped her, and then attacked her with a knife. The cause of death was exsanguination caused by knife wounds to the victim's neck. There were at least four separate knife injuries to the neck, leaving a gaping wound measuring five and a half inches by three and a half inches. (T.p. 1682)

The defendant presented a defense of not guilty by reason of insanity. One psychologist was presented in support of this claim. The State presented two psychiatrists and a psychologist in opposition. The jury returned verdicts of guilty as charged on all three counts, and on both death specifications. Trial concluded on May 17, 1983. At that time, the Court set the sentencing hearing for May 20, 1983.

Just prior to the sentencing hearing, the defendant first raised the issue of the constitutionality of the Ohio Death Penalty. Defendant raised five specific issues. One, that felony murder is treated harsher than premeditated murder. Two, the weighing procedure at the sentencing hearing involved too low a burden of proof. Three, the statute fails to provide the jury with guidance at sentencing. Four, defendant argued death was not the least restrictive option available. Five, defendant argued that jury sequestration was improper. The motion was denied.

At the sentencing hearing, the Court reversed the usual procedure. Although the State had the burden of proof, the Court allowed the defendant to open and close the arguments. The Court also indicated that the State could present no new evidence and

was limited to rebuttal type evidence alone. This procedure was followed. At the conclusion of this hearing and deliberations, the jury recommended a sentence of death. On May 25, 1983, the trial court imposed a sentence of death on the Aggravaged Murder count, and sentences of seven to 25 years on each of the other counts. All sentences were made to run consecutively. On December 11, 1985, the First District Court of Appeals affirmed both the conviction and the sentence. On June 24, 1987, the Ohio Supreme Court also affirmed both the conviction and sentence. The present action follows therefrom.

REASONS FOR DENYING THE WRIT

I. CALDWELL V. MISSISSIPPI (1985), 472 U.S. 320, IS NOT APPLICABLE WHERE THE JURY CHARGE GIVEN DURING THE MITIGATION PHASE OF A CAPITAL PROSECUTION IS AN ACCURATE STATEMENT OF LAW, DID NOT ENCOURAGE THE JURY TO RELY ON THE APPELLATE PROCESS, WAS NOT OBJECTED TO AT TRIAL, AND WAS ARGUED TO THE JURY BY DEFENSE COUNSEL.

ISSUES PRESENTED FOR REVIEW AND ARGUMENT

1. AN APPELLATE COURT NEED NOT CONSIDER AN ERROR WHICH A PARTY COMPLAINS OF THE TRIAL COURT'S JUDGMENT COULD HAVE CALLED, BUT DID NOT CALL, TO THE TRIAL COURT'S ATTENTION AT A TIME WHEN SUCH ERROR COULD HAVE BEEN AVOIDED OR CORRECTED BY THE TRIAL COURT.

2. A JURY INSTRUCTION DURING THE PENALTY PHASE OF A CAPITAL CASE INFORMING THE JURY THAT THEIR DEATH PENALTY VERDICT IS ONLY A RECOMMENDATION, WHILE A LIFE SENTENCE VERDICT IS BINDING, DOES NOT OFFEND THE UNITED STATES CONSTITUTION.

3. A DEFENDANT MAY NOT OBJECT TO A JURY INSTRUCTION WHERE HE HAS ARGUED THE IDENTICAL CONCEPT OF LAW TO THE JURY IN HIS ARGUMENT TO THE SENTENCING JURY.

[Argued Together]

ARGUMENT

Petitioner raises here an argument based on this Court's decision in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). The Ohio Supreme Court has extensively and thoughtfully considered the Caldwell issue on several occasions. State v. Rogers, 28 O.S.2d 427, 504 N.E.2d 52 (1987); State v. Buell, 22 O.S.3d 124, 489 N.E.2d 495 (1986) Rogers was specifically remanded by this Court for consideration of the Caldwell issue. [106 S.Ct. 518] While Rogers involved argument, and this case involves a jury charge, the situations are similar enough to create a valid analogy. In Rogers, the Ohio Supreme Court wrote the following two syllabus paragraphs:

> "1. **Caldwell v. Mississippi** (1985), 472 U.S. 320, is inapplicable where the statements made to the jury during the mitigation phase of a capital trial were accurate statements of the law and were not made to induce reliance on the appellate process.
>
> 2. If defense counsel improperly characterizes the role of the jurors during the mitigation phase, then the prosecution may make a brief, corrective statement.

These syllabus paragraphs reflect the Ohio Supreme Court's interpretation of Caldwell, with the caveat that the Court has indicated that it prefer that such argument not be made if possible. State v. Jenkins, 15 O.S.3d 164, at 202, 473 N.E.2d

264 (1984). The Caldwell issue has been raised in several Ohio death penalty cases. With the exception of Rogers, supra, this Court has not granted certiorari in any of these cases.

In the present case, the Caldwell issue is not properly preserved for appeal. The issue was not raised at trial, and was not raised on appeal until the filing of a supplemental brief containing it as petitioner's 28th assignment of error.

The gist of appellant's claim is that the trial court erred in instructing the penalty jury that the jury's verdict recommending a death penalty was just that, a recommendation; while the verdict giving life in prison with parole eligibility after 20 or 30 years was binding. The exact language of this charge was as follows:

> "You must understand, however, that a jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests with this Court after the Court follows certain additional procedures required by the laws of this State. Therefore, even if you recommend the death penalty, the law requires the Court to decide whether the defendant, David Joseph Steffen, will actually be sentenced to death or to life imprisonment. . . .
>
> You must understand that if you make one of these particular recommendations [either life with parole after 30 or 20 years] it will be binding upon the Court and the Court must impose the specific life sentence that you recommend." (T.p. 3017-18)

There was no objection to this charge by defense counsel.

It might also be noted that the above quoted charge is not the only place in the record where this matter was placed before the jury. During voir dire, the parties went through two special venires. Each of these panels were given a similar explanation. (T.p. 30-31, T.p. 873) This also was done without objection of any kind. Further, almost every single prospective juror was advised of this individually during the voir dire. Again, no objection of any kind was raised.

This issue thus first presents itself as an issue of waiver. Ohio holds that objections not raised at trial may not be raised on appeal. State v. Williams, 51 O.S.2d 112, 364 N.E.2d 1364 (1977). State v. Awan, 22 O.S.3d 120 (1986). The first syllabus paragraph from Williams states:

> "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."

The Ohio waiver rule is of long standing, and is well recognized. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558 (1982). In Engle, this Court recognized and approved the Ohio waiver rule, stating:

> None of the respondents challenged the constitutionality of the self-defense instruction at trial. They, thus, violated Ohio Rule of Criminal Procedure 30, which requires contemporaneous objections to jury instructions. Failure to comply with Rule 30, is adequate under Ohio law to bar appellate consideration of an objection. [citations omitted] The Ohio Supreme Court has enforced this bar against the very due process argument raised here. [citations omitted] We must determine, therefore, whether respondents may litigate, in a federal habeas proceeding a constitutional claim that they forfeited before the state courts." (emphasis added)

The waiver rule was also discussed in the Caldwell cases itself. In Caldwell, there had been an objection at trial, but the issue was not assigned as error on appeal. However, the Mississippi Supreme Court sua sponte raised the issue and discussed its merits. This Court indicated that if the issue had been rejected at the state level on the basis of the failure to raise it, the Supreme Court would not have considered it. [105 S.Ct. at 2638-9] Appellee submits that this issue should be rejected because it was not raised at trial, and further, that this issue should not be treated on the merits.

The charge at issue here was a correct statement of Ohio law. State v. Buell, 22 O.S.3d 124, 489 N.E.2d 795 (1986); State v. Rogers, 28 O.S.3d 427, 504 N.E.2d 52 (1987). State v. Buell involved a charge "substantially similar" to the charge in the present case. The Ohio Supreme Court so determined in deciding this case [31 O.S.3d at 114]. The Ohio court decided in Buell that this charge was a correct statement of law. As that Court stated in Buell:

> "Finally, unlike the comments to the jury in **Caldwell v. State, supra**, the instructions given to the jury in this case are an accurate statement of the law in Ohio. R.C. 2929.03(D)(2) provides:
>
> '* * * If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender

> was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender * * *' (Emphasis added)

This is clearly a question of state law, decided by the highest state court. The issue as to the correctness of the charge as a statement of state law is thus foreclosed. This Court will not interfere in the decision of a State Supreme Court interpreting State law. Petitioner's extensive argument to the contrary is feckless. The charge given here is indisputably a correct statement of Ohio law. Four of the eight justices who participated in Caldwell felt that a correct statement of the applicable state law would not be improper.

The present case is more akin to California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446 (1983). Therein, this Court considered and upheld a California jury instruction that informed the sentencing jury that a sentence of life without parole could be commuted by the Governor. The essence of the holding was that the jury could properly be informed of how the sentencing process works. In the dissent in Caldwell, Justice Rehnquist referred to Ramos as follows:

> "Nor does the Eighth Amendment prohibit any and all communications to a capital sentencing jury concerning the availability of appellate review. In California v. Ramos, we upheld against Eighth Amendment challenge a California statute that required capital sentencing juries to be informed that the sentence of life without possibility of parole was subject to commutation by the Governor. We noted, inter alia, that the instruction was 'merely an accurate statement of a potential sentencing alternative,' 463 US., at 1009, 103 S.Ct., at 3457, and held that informing the jury of the possibility of commutation did not inject too speculative a concern into the jury's deliberations. Although we noted in Ramos that the challenged information bore more than marginal relevance to the jury's sentencing determination, Ramos is not distinguishable from this case on that ground; there is no constitutional requirement that all information received by a sentencing jury be 'relevant.' In any event, the fact that the jury's determination is subject to appellate review, if not common knowledge, is in any event information concerning the judicial process that one would think the jury is entitled to know."

The present case deals with a jury instruction of the type upheld in Ramos, not with closing argument, which Caldwell was concerned with. Justice O'Connor, who cast the crucial vote in Caldwell, specifically stated that she would have affirmed if the remarks had been accurate. In this case, there is no doubt that the instruction was an accurate statement of the law.

In responding to petitioner's claims concerning Caldwell, respondent initially discussed the waiver concept. In closing, respondent would like to point out and emphasize two aspects of this case that give even greater weight to the waiver argument.

In the present case, besides the instruction given by the trial court that the defendant specifically challenges here, the issue was also raised extensively during voir dire. The trial court gave two charges explaining the sentencing procedure, and the jurors were individually questioned as to this. (T.p. 300, 315, 321, 330, 331, 343, 358, 366, 419, 451-2, 466, 489, 521, 548, 665, 669, 717, 720, 743, 777, 8120, 831, 845, 974, 982, 989-90, 996, 1007-8, 1029-30, 1048, 1058, 1067) The emphasis in these questions was on the importance of the jurors role in imposing the death penalty; that the penalty could not be imposed unless they signed the death verdict. Many of the potential jurors were asked if they would have the courage to do this. The whole thrust of this was to point out the heavy responsibility that the jurors have in the sentencing process. This is exactly opposite of the supposed flaw in the Caldwell argument, i.e., that it tended to minimize the role of the jury. Again, this indicates that no Caldwell-type error occurred here.

Finally, this defendant is in even less of a position to complain about this instruction, since he made a similar argument to the jury, to-wit:

> "Now, if David Steffen is, is sentenced and you control the sentencing, you don't have an absolute say on the capital punishment aspect, but as far as the other sentencing it's your purview. The Court has to follow your recommendation as to 20 to life or 30 to life. His life is really in your hands on that." (T.p. 3000)

Thus, defense counsel at trial informed the jury that they did not have the final say on the death penalty but they did have the final say on the other sentencing options. Petitioner can not

now be heard to claim that the trial court erred in communicating the same thing to the jury. Any error would certainly be invited error.

II. THE USE OF THE SAME UNDERLYING FELONY TO ELEVATE A HOMICIDE TO AGGRAVATED MURDER AND THEN TO ELEVATE THE AGGRAVATED MURDER TO A CAPITAL OFFENSE DOES NOT CAUSE THE OHIO DEATH PENALTY SCHEME TO BECOME UNCONSTITUTIONAL.

a) narrowing function:

Defendant relies on Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983), and Barclay v. Florida, 463 U.S. 939, 103 S.Ct 3418 (1984), for the proposition that the function of aggravating circumstances is to narrow the class of homicides which are eligible for the death penalty. The Court's concern in these cases was to provide the jury or trial court with specific aggravating factors that would prevent ". . . arbitrary and capricious sentencing like that found in Furman." Zant v. Stephens, supra, at 103 S.Ct. 2724. The Ohio statute does in fact satisfy this criteria.

O.R.C. 2903.01 defines aggravated murder. Section (A) defines premeditated murder, and section (B) describes felony murder. O.R.C. 2929.04(A) lists eight (8) aggravating circumstances which will elevate an aggravated murder to a capital offense. One of those circumstances, i.e., (A)(7), is that the offense is a certain type of felony murder. Petitioner feels that this dooms the Ohio statute because it does not make premeditated murder a capital offense. In making this argument, petitioner ignores the fact that any of the seven (7) remaining aggravating circumstances could be applicable to a premeditated murder. (A)(7) itself can also be applicable to premeditated murder. Thus, premeditated murder can be a capital offense. Secondly, it is the duty of the legislature to draft statutes, and to determine which homicides will be death eligible. The possibility that certain types of premeditated murder are not capital offenses does not make the statute unconstitutional.

Petitioner feels that the aggravated circumstance found in 2929.04(A)(7), felony murder, is improper because it merely repeats an element of the crime. In other words, the same act that makes the crime an aggravated murder also makes it a capital offense. There is nothing improper in this approach. The legislature has determined that certain felony murders should be punishable by death, where appropriate. In view of the statutory scheme in Ohio, this can only be done through use of an aggra-

vating circumstance. Various federal appellate decisions have already upheld this concept. Wingo v. Blackburn, 783 F.2d 1046 (5th Circ. 1986); Lowenfield v. Phelps, 817 F.2d 285 (5th Circ. 1987); Gray v. Lucas, 677 F.2d 1086 (5th Circ., 1982).

Petitioner's "lack of narrowing" argument is factually incorrect. The felony murder aggravating circumstance does not mirror the felony murder statute, in fact, it does substantially narrow the statute. Felony murder is defined in R.C. 2903.01(B) as follows:

> "(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape."

The aggravating circumstance at issue here, 2929.04(A)(7) is defined as follows:

> "(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." (emphasis added)

The aggravating circumstance does significantly narrow the class of felony murders that are death eligible. Not only must the State show the felony murder, it must also prove one of two possible narrowing circumstance, i.e., that the offender was the principal offender, or, that the murder was committed with prior calculation and design. Also several of the crimes found in the felony murder statute are not present in the aggravating circumstance. Obviously, not all felony murderers will be death eligible. The statute does treat premeditated murder and felony murder equally. Some, but not all, from each class will be death eligible. In fact, all eight (8) Ohio aggravating circumstances could conceivably apply to premeditated murder. Petitioner's claims that all premeditated murders escape the death penalty is simply incorrect.

Defendant's argument that the aggravating circumstances must contain an element independent of the elements of the principal offense has been specifically rejected by the Ohio Supreme Court. State v. Jenkins, 15 O.S.3d 164 (1985); State v. Rogers, 17 O.S.3d 174, (1985). In Jenkins, that Court stated:

> "The system currently in place in Ohio enables this Court to obtain a vast quantity of information with which to effectuate proportionality review, beginning with data pertinent to all capital indictments and concluding with the sentence imposed on the defendant, whether or not a plea is entered, the indictment dismissed or a verdict is imposed by the sentencing authority. See R.C. 2929.021, supra, at fn. 13. Although appellant would have this court require juries returning a life sentence to specify which mitigating factors were found to exist and why they outweigh aggravating circumstances, we conclude that such information is not an indispensable ingredient in assisting us to determine whether the imposition of a death sentence is disproportionate to sentences imposed for similarly proscribed crouses of conduct.
>
> Appellant further asserts that R.C. 2929.03 and 2929.04 are unconstitutional for treating felony murders in a different manner than premeditated murders. According to appellant, a principal in a felony murder is treated more harshly than a defendant charged with a premeditated murder, since a felony murder constitutes one of the eight aggravating circumstances under R.C. 2929.04, while premeditation is not set forth as an aggravating circumstance. Stated otherwise, appellant argues that aggravating factors for felony murders simply duplicate an element of the offense, while a murder by prior calculation and design requires proof of a separate aggravating circumstance in order to justify a death sentence. As such, appellant argues that a single act should not both convict and aggravate.
>
> Assuming, arguendo, that the elements set forth under R.C. 2929.04(A)(7) are identical to those set forth under R.C. 2903.01(B), we need only review the Texas statute at issue in Jurek to determine whether such a practice is constitutionally proscribed.
>
> The Texas statute under consideration in Jurek did not set forth a category of statutory aggravating circumstances which, if proven would justify the imposition of the death penalty. Instead, the Texas system set forth five classes of murders the existence of any one of which would justify the imposition of a death sentence. The high court took notice of the fact that the five classes of murder set forth in the Texas statute encompassed the separate aggravating circumstances set forth in the Georgia and Florida statutes under consideration in Gregg and Proffitt.

> In sustaining the Texas statute, wherein the conduct which convicts also aggravates, the court stated:
>
> '* * * So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option - even potentially - for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.' Jurek, supra, at 271.
>
> Applying Jurek to the arguments raised by appellant in the present case demonstrates that even if we were to construe the aggravated conduct of felony murder set forth within R.C. 2903.01(B) as functionally equivalent to the aggravating circumstance under R.C. 2929.04(A)(7), no constitutional infirmities would arise. On the contrary, any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option."

The rationale expressed by the Ohio Supreme Court on this issue is entirely consistent with the decision of this Court.

b) treatment of premeditated murder:

Petitioner's second heading under this issue indicates he is concerned about the supposed disparate treatment accorded premeditated murders as opposed to felony murders under the Ohio death penalty system. The argument however, does not exactly correspond to this proposition. Instead the argument appears to be a jeopardy based claim that the defendant is being thrice punished for the same act. Petitioner argues that in a felony murder the same felony is used three times, once as a felony conviction, once to make the homicide an aggravated (felony) murder, and once to make the aggravated murder a death eligible crime. Defendant's argument is incorrect.

So long as the legislature intended cummulative punishment for the underlying felony and the felony murder, multiple convictions are permissible. Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432 (1980); Albernay v. United States, 450 U.S. 333, 101 S.Ct. 1137 (1981); Garrett v. United States, 471 U.S. _____, 105 S.Ct. 2407 (1985). The Ohio Supreme Court has already determined that this is indeed the legislative intention in Ohio.

State v. Bickerstaff, 10 O.S.3d 62, 461 N.E.2d 892 (1984); State v. Moss, 69 O.S.2d 515, 433 N.E.2d 181 (1983). As long as the convictions are obtained in one proceeding, no problem is involved. Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673 (1983). Petitioner's claim that he is punished three times for the same act is spurious. He will be sentenced once for the underlying felony and once for the homicide. He will not get two sentences for the homicide as he states in his brief [petitioner's brief at p. 13]. The fact that alternative sentences are a possibility in no way puts him in jeopardy of more than one punishment.

Peittioner infers, in a classic non-sequitor, that because of this supposed "triple punishment" for a felony murder, that it is possible to obtain the death penalty in a felony murder situation upon less proof than is necessary to obtain a death-penalty in a case charging prior calculation and design plus a specification, and that therefore the statute is unconstitutional. Apparently he believes that in a felony murder situation the state need only prove two points to obtain a death penalty; [since the death spec. is an element of the crime].

1) a purposeful killing;

2) during a certain felony;

while in a prior-calculation crime the state must prove three points:

1) a purposeful killing;

2) with prior calculation and design;

3) a death specification.

Petitioner simply ignores the fact that in all aggravated murders, Ohio requires that the state prove a specific intent to kill. R.C. 2903.01(D). This places a further requirement in the proof of felony murder, and thus evens out the number of required elements of proof. [since prior calculation and design subsumes specific intent.] However, this counting of elements of proof is totally irrelevant. Simply because one crime is more difficult to prove than another does not mean that they cannot have similar or identical penalties. Punishment is to be determined by the

legislature, and unless their judgment is clearly and patently wrong it will not be disturbed. Respondent submits that the petitioner's argument here is without merit.

III. WHERE AN ISSUE PRESENTED TO THIS COURT FOR REVIEW IS PREMISED UPON A MISSTATEMENT OF THE APPLICABLE STATE LAW, AND WHERE THE STATE LAW AS IT EXISTS WAS PROPERLY APPLIED TO THE CASE, PETITIONER HAS NO BASIS TO SEEK CERTIORARI.

Petitioner contends here that the Ohio Supreme Court applied the wrong standard of review when carrying out its statutorily mandated review of the appropriateness of the death penalty. Petitioner contends that Ohio law requires the State Supreme Court to conduct a de novo review and determine that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. In fact it is petitioner who has misconstrued the law. R.C. 2929.05, Appellate Review, establishes the duty of the Ohio Supreme Court to review the appropriateness of the death sentence. That statute provides in pertinent part as follows:

> "(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they reviews the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of comitting outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case." (emphasis added)

This statute requires that the Ohio Supreme Court affirm the death penalty if they determine that the "aggravating circumstances outweigh the mitigating factors in the case." Simply put, contrary to what petitioner says, the Ohio law does not require the Supreme Court to make its finding "beyond a reasonable doubt." Nor is there any requirement that a reviewing court come to such a conclusion 'beyond a reasonable doubt.' See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976).

The Ohio Supreme Court stated its duty under this statute as follows:

> "Our final task today is to undertake the independent weighing process required by R.C. 2929.05(A) to determine whether the aggravating circumstances the offender was found gulity of committing outweigh the mitigating factors in the case." [31 O.S.3d at 126]

The Court concluded that the aggravating circumstances do outweigh the mitigating factors. Petitioner complains that the phraseology the Court used to reach this conclusion demonstrates any number of errors. That language is:

> ". . . we must conclude that the mitigating factors are inadequate to outweigh the aggravating circumstances in this case."

Petitioner contends this language shows the Court applied the wrong standard. This semantic nit-picking is devoid of substance. In reaching this conclusion, the Court had just spent four pages of decision explaining that the mitigating factors were virtually non-existent and that the aggravating circumstances were overwhelming. Respondent would wager that Petitioner is the only one who has any difficulty is understanding what the Court said.

IV. THERE IS NO BASIS FOR REVIEWING A CLAIM THAT A DEATH PENALTY WAS BASED UPON NON-STATUTORY AGGRAVATING CIRCUMSTANCES, AND UPON A REFUSAL TO CONSIDER MITIGATING FACTORS, WHEN THE RECORD PLAINLY DEMONSTRATES THAT THESE CLIAMS ARE INCORRECT.

1.) The Youth of the Petitioner:

Petitioner contends that the trial court failed to give adequate consideration to his age as a mitigating factor. R.C. 2929.04(B) lists the various mitigating factors that are at issue at sentencing. R.C. 2929.04(B)(4) reads:

"(4) The youth of the offender."

As with any factual issue the clear weight of the Ohio authorities is that such issues are to be determined by the trier of fact. State v. Thomas, 70 O.S.2d 79 (1986); State v. DeHass, 10 O.S.2d 230 (1967). In the present case, it was up to the trial court to analyze the evidence and to determine what weight, if any, should be given to age as a mitigating factor. In his required opinion, the trial court carefully reviewed all possible mitigating factors. To the extent that a particular factor was in the record, it was treated by the Court. Factors which were present to a greater degree were given more extensive treatment. Factors which were not present received lesser treatment. With regard to youth of the offender, the Court found that factor to be unpersuasive.

R.C. 2929.03(F) requires the Court to state in its written opinion "the existence of any of the mitigating factors set forth in division (B) of section 2929.04. . ." and explain the reasons why the aggravating circumstances outweigh the mitigating factors. Obviously, if a particular factor is found not present, it will receive a summary treatment. With regard to 2929.04(B)(4), the Court stated in its opinion

> "(4) 'The youth of the offender.' The Court finds that the defendant was born December 22, 1959, and at the time of his trial was twenty-three years of age. There is absolutely no evidence to suggest that he was a youthful offender or that his age was a factor that should be taken into account in mitigation of the sentence of death. This factor was not present.

The trial court thus found that there was no probative evidence that youth should be considered as a mitigating factor. The record supports this conclusion. The defendant was 23 years old,

five years into death penalty eligibility. He was not an innocent naive "youth." He had an extensive criminal record, and was on probation at the time of this offense. He had spent much of his life incarcerated, and was institutionally sophisticated. The offense itself was a heinous, brutal crime, not the act of a youth.

Petitioner apparently believes that the Court must write at length about every factor. That is not what the statute requires. The statute requires an explanation of why aggravating factors outweigh mitigating ones. The trial court examined the youth factor, and noted for the record that he did not find it present. The defendant, while taking the trial court to task for its lack of verbosity here, does not offer any reason, or explanation of why this factor should be given greater weight. Absent a convincing argument in support, this claim is without merit. The Ohio Supreme Court came to the same conclusion. [31 O.S.3d at 117]

2.) demand for retribution

Petitioner contends that the trial court relied upon an improper, non-statutory factor in imposing the death penalty. Petitioner claims that the trial court sentenced in order to satisfy a public demand for retribution. He bases this premise upon the following remark, made by the trial at sentencing:

> "This is what the Legislature had in mind when it passed the new death penalty law. The Legislature was reacting to the demands of the public for retribution and this is an appropriate case to provide such retribution." (T.p. 3050)

No objection was made to this remark at trial. Thus, the matter may not now be raised on appeal. State v. Williams, 51 O.S.2d 112 (1977); State v. Phillips, 27 O.S.2d 294 (1971). Nor is this material found in the trial court's sentencing opinion.

Further, defendant has misinterpreted the trial court's remarks. The Court simply said that the death penalty was reenacted because the public overwhelmingly favored it. The trial court then repeated a truism. Retribution is one of the bases for the death penalty, and it is a proper base. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976) Finally, the trial court indicated that this was an appropriate case for such a

penalty. The court did not say, as defendant incorrectly implies, that the death penalty was given because a mob on the courthouse steps was clamoring for blood. In fact, the court's written opinion, in which the Court is required by law to give his reasons for imposing the death penalty, contains no mention of this at all.

The trial courts of this State are presumed to apply the correct law. State v. Eubanks, 60 O.S.2d 183, 14 O.O.3d 416 (1979). As the Ohio Supreme Court has noted, this rule is not to be lightly treated. State v. Combs, 18 O.S.2d 123 (1985) Taking one or two sentences from a transcript which exceeds three thousand (3000) pages, and using them out of context, or with a strained interpretation, will not justify a reversal. In this case, the language at issue does not even justify the conclusions petitioner derives from them.

3.) future dangerousness

Petitioner next argues that the trial court improperly considered "future dangerousness" as an aggravating factor. During the court proceedings at the time of imposition of sentence, the trial court made the following statement:

> "The defendant has been described as a human time bomb waiting to explode. He did just that in this case and the results were devastating. There is no evidence to suggest that the same type of delayed explosive reaction could not happen again unless action is now taken to prevent it." (T.p. 3049-50)

Petitioner did not object to this statement, although he did have an opportunity to do so. Likewise, the petitioner made no attempt to have the Court clarify what it meant by this remark. He now claims that this remark shows that the trial court considered an improper non-statutory aggravating factor in imposing sentence, i.e., the future dangerousness of the appellant. It is a general rule of appellate practice that an appellate court will not consider a claim of error that was not raised at trial. State v. Williams, 51 O.S.2d 112 (1977). This same rule applies to error that are alleged to be constitutional in nature. State v. Phillips, 27 O.S.2d 294 (1971); State v. Awan, 22 O.S.3d 120 (1986). In Williams, the Court stated:

> "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called,

> but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."

Since this issue was not raised below, it may not now be raised on appeal. The Ohio First District Court of Appeals, at page 26-27 of its opinion, [see appendix to petitioner's brief] rejected this claim of error for various reasons. One of these reasons was the waiver question. Another was that these oral remarks are nowhere repeated in the trial court's opinion, which is controlling. Further, the remark at issue here is ambiguous. There is nothing in it which suggests that the trial court is predisposed to impose the death penalty improperly. The remark could just as easily refer to other possible sentencing options such as 30 years incarceration without parole. In fact, in the required written opinion, the trial court at no time referred to future dangerousness. The written report must take precedence over the oral remarks made at sentencing. Recently, in State v. Combs, 18 O.S.3d 123 (1985), the Ohio Supreme Court stated:

> "A reviewing court must presume that the trial court applied the law correctly. State v. Eubank (1979), 60 Ohio St.2d 183 [14 O.O.3d 416]. This requirement is violated when the reviewing court isolates two brief extracts from a lengthy transcript and infers therefrom that the trial judge did not understand the law. The first incident relied upon by the court of appeals, i.e., the trial judge's questions concerning whether defendant suffered from a psychosis or neurosis, simply does not by itself indicate a misunderstanding of the Staten test. The second incident, the trial judge's comment in his final ruling from the bench that the defendant did not have a psychosis or neurosis, also fails to establish clear error when viewed in the context of the record as a whole."

In his brief, the petitioner frequently follows the practice condemned in Combs. He takes small parts out of context and attaches to them a significance they were never have been intended to have.

In rejecting this argument, the Ohio Supreme Court stated as follows:

> "As to the trial court's purported reliance on the factors of appellant's future dangerousness and the public's demand for retribution, the remarks to which appellant objects appear only in the court's oral statement in open court before sentencing. No mention of such factors is made in the actual written opinion of the court. Viewing the record as a whole, and mindful

> of the presumption of correctness in the proceedings below, we do not consider these two brief remarks to carry such significance as to taint the entire process of sentence determination in this case. See State v. Coombs (1985), 18 Ohio St.3d 123, 125, 18 OBR 153, 155, 480 N.E.2d 414, 416-17."

This is certainly the correct resolution of this particular complaint.

4.) the aggravated burglary conviction:

Petitioner complains here that the evidence does not support his conviction for Aggravated Burglary and the corresponding death specification. In reality, this is a dispute over the interpretation of state law. The issue that was disputed below was whether or not the "trespass" element of the crime of aggravated burglary could arise after entrance as well as before entrance to a home. This was purely a question of state law, and the Ohio Supreme Court gave an authoritative interpretation of that law. In this Court, petitioner continues to insist that this interpretation is incorrect. Apparently petitioner wants this Court to review the Ohio Supreme Court's interpretation of Ohio law, a practice this Court does not engage in. 28 U.S.C. §1257(3)

5.) nature and circumstances of the offense:

Petitioner's complaint here is that the trial court treated the "nature and circumstances of the offense" as an aggravating circumstance. This claim is simply untrue. In support of his position, the petitioner cited below [in this brief petitioner does not cite to the record to support his claim. He simply states, without explanation or citation, that the trial court did the act now complained of], to the following language in the trial court's opinion:

> "The true circumstances of the offense can be gleaned from the testimony of the state's witnesses who described the scene, the victim's condition, the condition and location of her torn clothes and the presence of semen both in the victim's vagina and in her panties and the presence of spermatazoa. There is ample evidence to indicate the very sordid nature of the offense and its specific consequences. . . . The last moments in the life of Karen Range, in that small bathroom, and in very close proximity to the defendant, it must logically be inferred, were filed with horror and pain." (Op. p. 14, defendant's brief, pg. 36)

This language has been taken out of context, and in any event, it reflects a proper compliance with the applicable statutes. In context, the above statement is taken from a portion of the trial court's opinion which begins:

> "The Court now reviews the remaining possible mitigating factors in O.R.C. 2929.04(B) along with a 'consideration of the nature and circumstances of the offense, the history, character and background of the defendant, which the court will consider as number eight (8). . . ." (Op. p. 12)

In imposing sentence and weighing aggravating and mitigating factors, at least three (3) of the Ohio death penalty statutes require either the jury, the trial court or the appellate courts to consider the facts of the offense in the process.

R.C. 2929.03(A) provides in pertinent part that:

> "(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:. . ." (emphasis added)

This statute is titled, Imposing sentence for a capital offense, and requires the trial court to consider the facts of the crime in reaching a sentencing decision. R.C. 2929.04(B) provides in pertinent part:

> ". . . the court. . . shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history character and background of the offender, and all of the following. . . ."

Again, this statute requires the Court, in imposing sentence, to consider the facts of the crime. R.C. 2929.05, Appellate review of death penalty, provides in section (A) that:

> "(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court

> shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. . . ." (emphasis added)

It is beyond dispute that the laws of Ohio require the courts to consider the facts of the crime and the evidence adduced at trial, in determining the appropriate sentence. The trial court in the present case was doing no more than fulfilling his statutory duty in going over the facts of the crime. In State v. Jenkins, 15 O.S.3d 164 (1984), the Ohio Supreme Court specifically stated that the sentencing authority in Ohio must focus on the particular nature of the crime. Considering the facts as a possible source of mitigation, as required by Ohio law, the court must review them to see if they are such that they do show some mitigating tendency. In effect, what happened here is that the Court examined the facts of the crime, as was his duty. The Court, by his review, determined that such facts contained no mitigating material.

The Court has a duty to set forth his factual findings in his written opinion in order to demonstrate the basis for his conclusions concerning the aggravating and mitigating factors. The aggravating circumstances themselves also bring into play the facts of the crime. One cannot consider the weight to be given the aggravating circumstances without considering the circumstances of which they are comprised. The issue is not only that the aggravating circumstance was committed, but also how it was committed. Finally, the language of the trial court quoted by defendant does not support the defendant's assertion in his brief that the Court considered this material as an aggravating circumstance. The Court stated in its opinion what it considered in reaching its decision. The method used by the Court is stated as follows:

> "The sole issue, which confronted the Court is stated as follows:

> 'DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES WHICH THE DEFENDANT, DAVID JOSEPH STEFFEN, WAS FOUND GUILTY OF COMMITTING OUTWEIGH THE FACTORS IN MITIGATION OF THE IMPOSITION OF THE SENTENCE OF DEATH?'
>
> In this regard, all of the statutory mitigating circumstances and all other possible mitigating factors raised by counsel have now been reviewed and discussed. The same has been done with the aggravated circumstances.
>
> Upon full, careful and complete scrutiny of all the mitigating factors set forth in the statute or called to the Court's attention by defense counsel in any manner and after considering fully the aggravating circumstances which exist and have been proven beyond a reasonable doubt, the Court concludes that the aggravating circumstances do outweigh all the mitigating factors advanced by the defendant beyond a reasonable doubt as required by O.R.C. 2929.03(D)(3)." (Op. p. 23-24)

Earlier [at p. 12 of the opinion] the trial court specifically listed the "nature and circumstances" as a mitigating factor. Clearly, the trial court applied the correct test in reaching its sentencing conclusion.

In rejecting this claim, the Ohio Supreme Court stated:

> "Nor do we find error in the trial court's consideration of the nature and circumstances of the offense. R.C. 2929.04(B) provides that the court, in determining whether death is an appropriate penalty, '**shall consider**, and weigh against the aggravating circumstances proved beyond a reasonable doubt, **the nature and circumstances of the offense** * * *' (Emphasis added) Thus, the court is **required** to review this factor. However, appellant appears to contend that the trial court's remarks on this subject reveal that it viewed the nature and circumstances of the offense herein as aggravating rather than mitigating as required by R.C. 2929.04(B). We do not agree. The statute merely requires that the court consider this factor in determining the mitigating factors to be weighed against the proven aggravating circumstances. Obviously, the nature and circumstances of certain offenses will be such that no mitigating feature can be extracted. By its statement on the gruesome and vicious nature of the murder, the trial court herein was merely justifying its conclusion that no mitigating factors can be gleaned from the nature and circumstances of this particular offense. We find nothing improper in the court's remarks."

This approach represents the proper way to treat the 'nature and circumstances of the offense, and is the method commanded by the Ohio statues.

Petitioner concludes his argument by urging that Barclay v. Florida, supra, left open the question of how to deal with cases where non-statutory aggravating circumstances are coupled with strong mitigation, Unfortunately for petitioner, he can satisfy neither of these factual prerequisites. Not only were no improper aggravating circumstances considered, but further, this case is characterized by an almost total absence of mitigation. It is instructive to note that petitioner makes absolutely no attempt to list or develop the presence of mitigation. He merely states in conclusory language that it exists. Even a cursory examination of the record reveals the bankruptcy of petitioner's assertions.

The aggravating factors the petitioner was convicted of were a homicide in the course of a rape, and a homicide in the course of an aggravated burglary. As described earlier, the facts of this particular crime, which make up part of the aggravating circumstances set forth in the specifications, are particularly cruel and brutal. A young girl, about to be married, was raped and literally slaughtered in her own home. She was severely beaten about the head, raped, and then her throat repeatedly slashed such that her head was nearly severed. The defendant savagedly stomped on the victim's chest with enough force to leave identifiable shoeprints on her. The body was left sprawled on a bathroom floor, semi-nude, mutilated and bloody, where her unsuspecting parents came across her. The aggravating circumstances in this case are present to an excess.

In contrast, the mitigating factors are insignificant. The statutory mitigating factors are found in R.C. 2929.04(B), and include the facts of the crime, and the background, character and history of the defendant, along with seven (7) other specific factors. The facts of the crime are set forth earlier in this brief, there is certainly nothing mitigating about them. Likewise, there is nothing endearing about the defendant himself. In fact, he was basically a career criminal who had never done anything positive with his life.

A brief review of the seven remaining circumstances illustrate the correctness of the jury and trial court's decision here.

(1) victim induced or facilitated the offense.

This circumstance is totally absent from this case. The victim did not know the defendant. Their meeting was a chance encounter, in the victim's home. She did nothing which would induce or facilitate the crime.

(2) presence of duress, coercion or provocation.

Once again, this factor was totally absent from the case. Indeed, there was little the victim could have done in this regard. She was physically frail, while the defendant was large, well-conditioned, and a weight lifter. There is no indication anywhere of duress, coercion or provocation.

(3) petitioner had mental defect, which reduced his capacity to understand and control his conduct.

All of the psychiatric witnesses presented by the State indicated that the defendant had what they referred to as a borderline personality disorder. Basically, this meant that he chose not to conform his behavior to the rules of society. None of these witnesses felt that the defendant could not understand or control his conduct. One defense witness, Dr. Noelker, disagreed with this assessment. However, neither the jury nor the trial court found this testimony to be believeable.

(4) the youth of the offender.

The petitioner was 23 years old, five years above the cut-off age for the death penalty. He had been incarcerated often and had an extensive criminal record. He apparently had been emancipated for quite some time, and had spent a period of time drifting around the country. There was nothing about the defendant's age that would mitigate against the death penalty.

(5) lack of significant prior history.

This factor was not present. This petitioner had an extensive criminal history, and was on probation at the time of the present offense.

(6) offender was not principal offender.

Not only was the petitioner the principal offender, he was the only offender. This factor is not present.

(7) any other relevant factor.

The only thing offered here was that the petitioner led a tough childhood and had suffered much abuse. When weighed against the crime that was perpetrated here, the defendant's childhood is of little consequence. Many children suffer abuse, but that does not excuse or mitigate a vicious homicide. The defendant's own siblings went through the same experiences, and none of them felt that it was an excuse to pillage, rape and murder. In fact all information from the siblings indicated petitioner was exaggerating his tale of abuse.

In viewing these mitigating factors, or lack of same, as compared to the aggravated circumstances it is not difficult to see why the jury decided on the death penalty, or why the trial court accepted the jury recommendation. This is not a case where aggravating and mitigating evidence were close in quality. In fact, the jury probably had little difficulty in making its decision, if such a decision can ever be made without difficulty.

V. PROPORTIONALITY REVIEW IS NOT REQUIRED IN STATE DEATH PENALTY STATUTES, AND IF A STATE DOES PROVIDE FOR A PROPORTIONALITY REVIEW, IT IS UP TO THE STATE TO DETERMINE THE SCOPE OF SUCH REVIEW.

Petitioner seeks to have this Court rewrite the Ohio statute dealing with proportionality review. As with an earlier presented issue, this question does not involve matters which this Court would ordinarily review on certiorari.

This Court has already ruled that the various states are not required to conduct proportionality reviews in death penalty cases. Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984). Ohio, however, does provide for proportionality review by statute; R.C. 2929.05(A). That statute contains the following provision:

> "In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."

This provision has been construed by the Ohio Supreme Court to require comparison only with other capital cases. In deciding this case the Ohio Supreme Court wrote the following syllabus:

> "The proportionality review required by R.C. 2929.05(a) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed."

This construction of R.C. 2929.05(A) is in harmony with the statutory language and gives it its obvious meaning. Since proportionality review is not constitutionally required, the states may give their statutory proportionality review any way they desire. This Court indicated in Pulley v. Harris, supra, that the purpose of proportionality, was to serve as one more safeguard in the prevention of arbitrary and capricious sentencing. Just how effective such a scheme is may well be a function of its scope. However, the fact that one system may be broader in its review than another does not cause the narrower one to be constitutionally infirm. Since none is even required, a narrow proportionality review is obviously an improvement, as far as defendants are concerned anyway. It simply adds one more safeguard which is not constitutionally required.

VI. WHERE THE STATE COURTS HAVE FOUND THAT THE ADMISSION OF A STATEMENT BY THE DECEASED PURSUANT TO AN EXCEPTION TO THE HEARSAY RULE IS HARMLESS ERROR, AND THE STATEMENT AT ISSUE IS EXTREMELY INSIGNIFICANT, THIS COURT WILL NOT GRANT CERTIORARI WHERE THE RECORD FULLY SUPPORTS THE CONCLUSION OF THE STATE COURTS.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

A STATEMENT OF THEN EXISTING MENTAL, EMOTIONAL OR PHYSICAL CONDITION IS AN EXCEPTION TO THE HEARSAY RULE UNDER EVID. R. 803(3).

At trial, the victim's mother testified. During the course of her direct examination, the following occurred:

> "Q. Did you have occasion to discuss sexual matters with her?
>
> A. Yes, we did.
>
> Q. What did she tell you?
>
> A. She said she would remain a virgin until --
>
> MR. STUEVE: Objection to that, Your Honor. That's hearsay.
>
> THE COURT: Objection overruled. The answer may stand." (T.p. 1247)

Petitioner contends that the answer was inadmissible hearsay and should have been stricken. Petitioner feels that prejudice accrued to him since it was his position that the semen found in the victim's body came from some earlier sexual encounter, and that the above question and answer improperly negated his defense. [Although the State appellate courts felt it was harmless error to admit this evidence, respondent believes it was properly admitted.]

There are several flaws in the petitioner's position here. First of all, the boyfriend took the stand and denied ever having intercourse with the victim, who was his fiance. (T.p. 1292) Thus, the equivalent testimony was in the record, unobjected to, from another source. His last contact with her was around dinnertime the day before, and was very biref in nature. Secondly, the testimony by the lab people and the coroner was very clear that the semen in the victim's body was recently deposited before her death. (T.p. 1687-88) This ruled out the boyfriend and left only the petitioner as the source. Of course the lab testimony was that the petitioner could not be ruled out as a source. (T.p. 1629) Thirdly, it was apparent that the victim had recently showered before her death. Her hair was wet

and a curling iron was plugged in in the bathroom. Some semen was recovered on her pubic hairs. This was inconsistent with anything but extremely recent intercourse. Thus, no prejudice arose as a result of the testimony of the victim's mother.

As to the legal issue involved, respondent believes that the trial court's ruling was entirely correct. Evid. R. 803, Hearsay Exceptions: Availability of Declarant Immaterial, provides in section 3 as follows:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> (3) Then existing, mental, emotional or physical condition.
>
> A statement of the declarants then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

Under this rule, the decedent's statement as to her then existing physical condition of virginity was properly admissible.

The Court of Appeals and Ohio Supreme Court felt [incorrectly appellee believes] that this testimony was improper, but that its admission was harmless error. In view of the other evidence, referred to above, this conclusion as to harmless error cannot be faulted. Even more appropriate to the harmless error argument is the fact that the death specification at issue, R.C. 2929.04(A)(7), the so-called felony murder spec., is satisfied by proof of rape or of attempted rape. This petitioner conceded in his statement that he intended a rape, but could not get an erection. This alone would be enough to satisfy proof of the rape death specification.

CONCLUSION

Respondent requests this Court to deny the Petition for Writ of Certiorari.

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Appendix "A"

§ 2901.04 Rules of construction.

(A) Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2907.02 Rape.

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

§ 2927.01 Abuse of a corpse.

(A) No person, except as authorized by law, shall treat a human corpse in a way that he knows would outrage reasonable family sensibilities.

(B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.

(C) Whoever violates division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fourth degree.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

§ 2929.05 [Appellate review of death sentence.]

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

Any court of appeals that reviews a case in which the sentence of death is imposed shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.

(C) Whenever sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(2) The offender did not present evidence at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced.

HISTORY: 139 v S 1. Eff 10-19-81.

§ 2929.06 [Resentencing hearing after vacation of death sentence.]

If the sentence of death that is imposed upon any offender is vacated upon appeal because the court of appeals or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

§ 2945.25 Causes of challenging of jurors.

A person called as a juror in a criminal case may be challenged for the following causes:

(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

§ 2941.14 Allegations in homicide indictment.

(A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which, or the means by which the death was caused need not be set forth.

(B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.

(C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at the end of the body of the indictment or count, and may be in substantially the following form:

Specification (or, Specification 1, or Specification to the First Count, or, Specification 1 to the First Count). The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in divisions (A)(1) to (8) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same).

RULE 801. Definitions

The following definitions apply under this article:

(C) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

RULE 802. Hearsay Rule

Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.